

Novak (Migration) [2017] AATA 625 (10 April 2017)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms Gordana Novak

VISA APPLICANTS: Mr Valentin Naumovski
Miss Blagica Naumovska

CASE NUMBER: 1515191

DIBP REFERENCE(S): BCC2014/2390976 OSF2015/038034

MEMBER: Margie Bourke

DATE: 10 April 2017

PLACE OF DECISION: Melbourne

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DECISION: The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Statement made on 10 April 2017 at 12:53pm

CATCHWORDS

Migration – Partner (Provisional (Class UF) visa – Subclass 309 (Partner (Provisional)) -
Conflicting and unreliable evidence – Variety of evidence from witnesses – Inconsistency -
Credibility – Not genuine and continuing relationship

LEGISLATION

Migration Act 1958, ss 5F, 5F(2)(a)-(d), 65

Migration Regulations 1994, Schedule 2 – cl 309.211, cl 309.211(2), cl 309.221, r.1.15A(3)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 2 October 2015 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 22 September 2014 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied that the review applicant and primary visa applicant are in a mutually exclusive spousal relationship.
4. The review applicant appeared before the Tribunal on 20 March 2017 to give evidence and present arguments. The Tribunal also received oral evidence from Alex T (the primary visa applicant's brother-in-law), Andrea L (the review applicant's brother's fiancée), Fatima N (the review applicant's niece), Ivan N (the review applicant's brother) and Snezana T (the primary visa applicant's sister), and the visa applicant gave evidence via telephone. The review applicant attended a resumed hearing on 30 March 2017 to give further evidence and present arguments. The tribunal hearing was assisted by an interpreter in the Macedonian and English languages.
5. The review applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the review applicant and the primary visa applicant are in a spousal relationship within the meaning of s.5F at the time of application, and at the time of decision.

SPOUSE/DE FACTO (cl.309.211(2), cl.309.221)

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

8. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the primary visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. Based on the review applicant's certificate of Australian citizenship granted 19 February 1990, the tribunal is satisfied that she is an Australian citizen. In the present case the primary visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must

be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The tribunal has considered the primary visa applicant's divorce document dated 26 November 2012, and the marriage certificate of the parties from the city of Bitola in the Republic of Macedonia, dated 20 August 2014. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

11. Based on the written and oral evidence before it the tribunal makes the following findings. The parties met and communicated online prior to meeting in person. The primary visa applicant's sister and mother reside in Australia. The review applicant travelled to Macedonia with the primary visa applicant's sister and mother in August 2014 to meet the primary visa applicant. The review applicant stayed in Macedonia (with some small trips out of the country) from 7 August 2014 to 27 August 2014. The review applicant returned in August 2016 and spent a further 17 days in Macedonia (with further small trips out of the country). The parties married on 20 August 2014.
12. The parties married in August 2014 and lodged the application for the visa online on 22 September 2014. The tribunal accepts the parties reside in separate countries, and has assessed the evidence accordingly. The tribunal accepts the parties are financially independent. The tribunal accepts the review applicant has occasionally sent small gifts of money to the visa applicants. The tribunal accepts the review applicant has purchased a block of land in Australia, and the parties have discussed building a house on the land in the future.
13. The tribunal accepts the parties have not managed a household together. The tribunal accepts that in 2014, the review applicant was a guest in the primary visa applicant's home, with his mother and sister. The tribunal has considered the evidence that the parties travelled together during the review applicant's visits; the tribunal has considered the evidence which indicates that the parties did not stay in the primary visa applicant's home for a significant part of the total of the 20 days or the 17 days of the review applicant's two visits.
14. The tribunal has considered that the evidence of the financial aspects of the relationship and the nature of the parties' household in this case is limited. The evidence of the financial aspects of the relationship and the nature of the parties' household in these parties' circumstances do not greatly assist the decisionmaker to determine if the parties are in a spousal relationship. The circumstances of the relationship in relation to the financial aspects of the relationship and the nature of the household are not the significant circumstances of the relationship.
15. The tribunal has carefully considered the social aspects of the relationship. The oral evidence of the primary visa applicant's sister, her husband, the review applicant's brother, his fiancée, and the review applicant's niece was consistent that these relatives all stated

that they believed the relationship was a genuine one. The primary visa applicant's sister spoke of travelling over for the wedding and being pleased for the couple; her husband spoke of staying with his brother-in-law and returning with a gift for the review applicant and thinking they are both committed and happy. The review applicant's brother said he had never seen his sister happier, he 'looked out for' his sister and had no concerns that the primary visa applicant was not genuine. The review applicant's brother's fiancée told the tribunal that she had seen the parties on a video message from 2016 and they seemed happy. The review applicant's brother's fiancée stated she believed her fiancé would not let his sister be used or hurt by the primary visa applicant to obtain a permanent visa. The review applicant's niece (who lives with the review applicant), spoke of her aunt constantly messaging the primary visa applicant, and that they were both committed to the relationship. The tribunal has given the oral evidence of the relatives serious consideration and weight.

16. The tribunal has given weight and consideration to the oral evidence at the hearing, and the written evidence from other family members and friends. There is breadth of evidence before the tribunal that the parties represent themselves to relatives and friends as being in a married relationship. The evidence of the primary visa applicant's sister and brother-in-law, and the review applicant's brother comes under further scrutiny in this decision.
17. The tribunal has considered the evidence of the parties' commitment to each other. The tribunal accepts the parties met on line. In the application and documents provided in support, the parties claimed to have been communicating for a year. In the oral evidence at the hearing the review applicant stated they had been communicating since early 2014, and the primary visa applicant is not clear about the commencement date. He refers to communicating on the dating site for three to four months and then switching to facebook. At the time of application, the parties had known each other for at least eight months, based on the review applicant's evidence. At the time of application the parties had been married for one month, and had met in person six weeks previously. At the time of decision, the duration of the relationship is over two and a half years since the parties married. At the time of decision the parties had spent 37 days physically in each other's company.
18. The review applicant stated the secondary visa applicant planned to continue school, and had studied English at school. The tribunal accepts the evidence of the primary visa applicant that the child had studied English since grade 3 and French since grade 5. The tribunal has noted the review applicant was aware the child studied English, but notes it had been part of her curriculum for many years. The tribunal notes the parties had not discussed what school the secondary visa applicant would attend, or how to make the transition from Macedonian school to the Australian school easier, except for her to study more English.
19. The tribunal has considered the evidence that the parties gave about the review applicant's block of land, and the plan to build a house. The written evidence provided to the Department indicates the primary visa applicant anticipates he will have employment through relatives in Australia. The tribunal accepts the evidence indicates the parties had discussed some long term plans for the future, but notes there was limited evidence in relation to detailed plans or arrangements made by the parties together for the secondary visa applicant.
20. The tribunal accepts that there is some evidence of the parties' commitment to each other.
21. The tribunal has noted that the primary visa applicant's sister is the only one of the relatives who gave oral evidence at the hearing who had actually been present with the parties when they were together. The tribunal has considered that the review applicant stated that she met the primary visa applicant on a dating website, and she gave a detailed account of how they became aware that she knew his sister. The primary visa applicant provided the Department with a statement dated 22 August 2014 in which he states "*Since my sister*

introduce us...". The primary visa applicant's sister provided a statutory declaration dated 11 September 2014 in which she declares "...I was the one who introduced them." The primary visa applicant, his sister and the review applicant stated these documents were incorrect. The tribunal finds this troubling, that written evidence provided in support of the application is claimed by the parties to be wrong, and a different version of the commencement of the relationship is given to the tribunal than was provided in the written documents. It indicates to the tribunal that there may be an issue of credibility or reliability.

22. The review applicant told the tribunal that the primary visa applicant's sister spent all the 20 days in 2014 with her and the primary visa applicant. The sister stated she did not accompany her brother and the review applicant to Croatia.
23. The review applicant stated they had stayed at a tiny village of Korzac in Croatia, and neither of them had told the Department the name of this village because it was so tiny. The review applicant had told the Department they stayed at Osijek, and the primary visa applicant had stated they stayed at Beli Manastir. The review applicant told the tribunal that Osijek is the nearest town, and Beli Manastir is in between the village of Kozarc and Osijek, and they visited both these places. The primary visa applicant stated that they stayed at Beli Manastir in 2014, and did not visit any other place, and did not visit Osijek until 2016.
24. The review applicant stated that she and the primary review applicant communicate in Serbian language. The tribunal initially understood that the primary visa applicant's brother-in-law, and the review applicant's brother stated they had heard the parties communicate in Croatian language.
25. The review applicant stated there were 15 people at the wedding at the Registry office, and the same 15 people came to the restaurant. She stated village members who knew the primary visa applicant came in to wish him all the best; she stated they came in and out. The primary visa applicant told the tribunal there were 15 relatives at the restaurant, and then 15 friends and colleagues and their partners from Bitola who were not invited but came and sat at the next table. The primary visa applicant stated he did not remember, and then he stated two people, came into the restaurant to congratulate him but did not stay. The primary visa applicant's sister stated 15 relatives were invited, and neighbours and friends came and stayed and had a few drinks.
26. The tribunal discussed with the review applicant its concerns about the claim that the documents provided to the Department signed by the primary visa applicant and his sister, that stated his sister introduced the parties, were incorrect, (as described in paragraph 21 above). The tribunal put the inconsistent information to the review applicant as described in paragraphs 22 to 25 above, pursuant to s.359AA at the hearing. The tribunal allowed the review applicant time to consult with her representative prior to providing her comments or response. The review applicant chose to comment or respond at the end of the hearing.
27. The review applicant stated she and the primary visa applicant had been with his sister and mother in August 2014 except for the two days in Croatia, and a few hours here and there for time together like dates.
28. The review applicant stated in Croatia they stayed at Kozarc. To get to Kozarc, you go through Osijek and Beli Manastir. She stated maybe the primary visa applicant does not remember going through those towns; she stated Croatia is her home country and she knows the towns and villages well.
29. The review applicant stated Serbian and Croatian languages are just different dialects, and Macedonian is a slightly different language. The review applicant stated a Macedonian person or an Australian born person may not know the difference between the Serbian and

Croatian dialects. She stated Serbian and Croatian people understand each other, and in the former Yugoslavia, Serbian was the spoken language.

30. The review applicant stated that they all consistently stated that 15 people were invited to the wedding, and other people came, they may have been friends, colleagues or neighbours. The review applicant stated that people came and went from the restaurant. She also stated the primary visa applicant's recollection may have been flawed.
31. The tribunal considered these responses. The tribunal also considered that the review applicant had elected to comment or respond at the end of a long hearing. The tribunal wrote to the review applicant's representative and offered the review applicant the opportunity to have additional time to provide further comments or responses either in writing or in a short resumed hearing. The review applicant elected to attend a resumed hearing, and a further hearing was scheduled on 30 March 2017.
32. The review applicant told the tribunal at the resumed hearing that she and the primary visa applicant had travelled to Croatia by themselves, and had also had some dinners out together by themselves.
33. The review applicant stated the primary visa applicant's memory of the number of people at the wedding celebration may have been flawed because they had all had a lot to drink. She stated they invited fifteen guests, and the primary visa applicant invited more guests by telephone. When the primary visa applicant stated 70 guests were there, he assumed that 70 people could have been there, but he was intoxicated.
34. The review applicant stated Serbian and Croatian are not different languages but different dialects of the same languages, like English and Australian. The review applicant stated in former Yugoslavia, everyone spoke the Serbian language. The review applicant stated this is why when she is Croatian, she and the Macedonian primary visa applicant, communicate in Serbian language. She stated the primary visa applicant's brother in law (who stated that she and the primary visa applicant communicated in Croatian) was born in Australia and would not know the difference. She stated her brother is Croatian, and would know the difference. The tribunal suggested her brother had also stated that they communicated in Croatian. The review applicant challenged this, but her representative checked her notes and confirmed that the review applicant's brother also stated the review applicant and the primary visa applicant communicated in Croatian. After the hearing the review applicant provided a submission that her brother had stated he had communicated with the primary visa applicant in Croatian; he had not given evidence in relation to the language used between the review applicant and the primary visa applicant. The tribunal checked the audio of the hearing record and is satisfied that the review applicant's brother told the tribunal that he had communicated with the primary visa applicant in Croatian language. The tribunal accepts there was no adverse information or inconsistent evidence in relation to the language used to communicate between the parties.
35. The review applicant told the tribunal that they stayed at Korzac when they went to Croatia. She stated that you have to go through Osijek to get to either Korzac or to Beli Manastir. The primary visa applicant stated they stayed at Beli Manastir, but he does not know Croatia and does not know the area.
36. The tribunal has assessed the inconsistencies. The tribunal gives serious weight to the inconsistencies in relation to significant episodes in the relationship. The tribunal does not accept that in her evidence of the first time the parties physically met, the review applicant would forget that they spent two or three days away together, and not in the company of the primary visa applicant's sister, mother or daughter. The review applicant states she has only spent 37 days with the primary visa applicant; the review applicant states she spent 20 days

with the primary visa applicant in 2014. The review applicant told the tribunal that she spent two days travelling alone with the primary visa applicant; the review applicant had earlier also stated that the other family members were with them all the time, and it was only after the sister stated she was not there in Croatia, that the review applicant told the tribunal that she and the primary visa applicant travelled to Croatia alone together. The tribunal finds the review applicant's evidence about the days spent alone with the primary visa applicant in 2014 to be unreliable.

37. The tribunal is not satisfied that primary visa applicant and review applicant would not name the exact village they stayed in together but would name a larger town when being interviewed by the Department officers. The tribunal does not accept the parties either cannot remember where they spent their first time alone together, and further that the primary visa applicant declares that they did not visit Osijek in 2014, and the review applicant told the Department first that they stayed there, and the tribunal that they drove through Osijek and stayed near it in 2014. The tribunal does not accept that the fact the primary visa applicant is Macedonian and not Croatian means he cannot remember the name of a village he stayed in, or the name of a larger town they drove through. The tribunal finds the evidence of the review applicant and the primary visa applicant in relation to their trip to Croatia in 2014 to be unreliable and not credible.
38. The tribunal has considered the inconsistent evidence about the wedding and reception. The tribunal notes the variety in the evidence which included the review applicant stated there were 15 invited guests at the restaurant. The primary visa applicant told the Department there were 70 invited guests, he told the tribunal there were 15 invited guests plus approximately 15 uninvited colleagues at the next table, and later the primary visa applicant stated there were 15 guests at the restaurant plus 2 friends and neighbours who dropped in to wish them well, but did not stay. The primary visa applicant's sister stated there were 15 invited guests plus neighbours and friends came in to celebrate and stayed for a few drinks. The tribunal has considered the review applicant's explanation that the parties were intoxicated, and that the primary visa applicant was intoxicated, and this affected their / his memory. The tribunal is not satisfied that the many and varied accounts of the wedding reception guests can be explained by the intoxication of the primary visa applicant, or all the witnesses. The tribunal finds the difference in the number of extra guests, and whether they sat at a table, stayed for drinks, or left, are too broad to be accepted as plausible. The tribunal finds the variety in the explanations for the different range of number of people at the wedding celebration to be lacking credibility. The tribunal is not satisfied the wedding reception in the restaurant occurred as stated in the evidence.
39. The tribunal has considered the two documents signed by the primary visa applicant and his sister, that recorded the sister had introduced the parties. The tribunal was told by the primary visa applicant and by his sister that the documents were 'incorrect'. There was no satisfactory explanation as to why the primary visa applicant and his sister signed these documents, and provided them in support of the application. The tribunal finds the written and oral evidence of the primary visa applicant and his sister is not reliable or credible.
40. The tribunal has considered and balanced all the evidence before it. The tribunal is not satisfied that the parties had a wedding celebration due to the lack of reliable evidence about the celebration. The tribunal is not satisfied that the parties travelled to Croatia alone together due to the review applicant's initial evidence that they had not spent days alone together in 2014, and the unreliable evidence about the place they stayed in Croatia.
41. The tribunal has balanced the evidence of the parties' commitment to the relationship. The tribunal has considered the written and oral evidence before it.

42. The tribunal finds the review applicant and the primary visa applicant have given unreliable evidence. The tribunal is not satisfied the evidence of the social aspects of the relationship is reliable, as the tribunal is not satisfied that the evidence of the primary visa applicant's sister is reliable evidence.
43. The tribunal has carefully considered the evidence before it in relation to the social aspects of the relationship and the commitment of the parties to each other. The tribunal has also considered the more limited evidence of the financial aspects of the relationship and the nature of the parties' household.
44. The tribunal is not satisfied, based on the evidence before it, that the parties are in a genuine and continuing relationship. The tribunal is not satisfied that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The tribunal is not satisfied the parties live together, or not separately and apart, on a permanent basis, but the tribunal has considered that the parties reside in separate countries. The tribunal finds the review applicant and the primary visa applicant do not meet the requirements of s.5F(2)(b) and (c) at the time of application or at the time of decision.
45. Given these findings the Tribunal is not satisfied that the parties were in a spousal relationship at the time of application or at the time of decision.
46. As the parties were married at the time of application, the primary visa applicant does not meet the alternative criteria in cl.309.211(3).
47. Therefore the primary visa applicant does not meet cl.309.211 or cl.309.221.

48.

49. *Secondary Visa Applicant*

50. As the tribunal has found the primary visa applicant does not meet the primary criteria in subdivision 309.21, it follows that the secondary visa applicant does not meet the criteria in cl.309.311.
51. For the reasons above, the visa applicants do not satisfy the criteria for the grant of the visa.

DECISION

52. The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Margie Bourke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).